THE ORIGIN OF THE RIGHT TO ENGAGE IN INTERSTATE COMMERCE.

THE provision of the Constitution which compels the courts to distinguish between interstate commerce and that commerce which is domestic within each state, presents the problem of projecting a physical boundary line as an economic distinction. This is not always possible. The history of the subject offers some logical principles which can be followed so far as they go, but where these fail the courts can only endeavor, largely by arbitrary methods, to establish rules capable of practical use.

The subject is somewhat further complicated by the fact that the federal power over commerce is derived not alone from the commerce clause nor wholly excluded from the domestic commerce of the states, while on the other hand the states have jurisdiction to a considerable extent over interstate commerce.

The federal power over travel and transportation resulting from the construction of the Constitution in Crandall *v.* Nevada[1] is based upon the rights and duties of citizens and of the government, although it is extended to include transportation conducted by corporations.

The Fourteenth Amendment and the Fourth Article of the Constitution protect also the rights of citizens, although the Amendment goes beyond the provision of the Article in securing to all persons within the jurisdiction of a state, whether citizens, corporations, or aliens, the equal protection of the laws. None of these powers is necessarily commercial in nature, nor limited in operation to the transportation which crosses state lines. So far as they reach commerce at all, both domestic and interstate commerce fall equally within their operation, and as the right to engage in domestic commerce does not originate in these federal powers the right to engage in interstate commerce must also find its source elsewhere.

The question is thus presented as to the source of the right to engage in interstate commerce, — a question not only of theoretical interest, but having also practical bearings.

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[1] 6 Wall. 35.

It has been strongly urged, for example, that the federal government should exclude from interstate transportation some classes of goods, which, intrinsically, are legitimate subjects of commerce, such as "trust"-made goods, the feathers of certain birds, or the products of convict labor.[1]

If the right to engage in interstate commerce find its source only in federal law, this argument may possibly be correct, — the right may be one which the federal government may grant or withhold at pleasure.

On the other hand, if the right be not derived solely from the federal government, but originate in state law, it may perhaps be one of the privileges and immunities of state citizenship which are protected by the Constitution, or it may for other reasons be beyond federal prohibition.

"Like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument."[2]

These questions it is not proposed here to discuss. We are now concerned solely with the preliminary question whether the right to engage in interstate commerce originates in state or federal law.

It may be well also at this point to emphasize the fundamental difference between interstate and foreign commerce. The states of the Union are not known to foreign nations. So far as relates to other countries American commerce is necessarily national in character, and is conducted under federal authority and protection alone,[3] without reference to the question whether as between

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[1] In his speech at Pittsburg, October 14, 1902 (36 Cong. Rec. 412), Attorney-General Knox advocated the adoption of such legislation as a method of bringing the great industries of the country within effective federal control. Admitting apparently, as is unavoidable, that the manufacture and production of articles of commerce are within state jurisdiction, as is also the creation of corporations, determination of amount of capital, publicity of operation, etc., Mr. Knox nevertheless urges that it is reasonable to say that Congress may "deny to a corporation whose life it cannot reach the privilege of engaging in interstate commerce except upon such terms as Congress may prescribe to protect that commerce from restraint. Such a regulation would operate directly upon commerce, and only indirectly upon the instrumentalities and operations of production."

In other words, it is the position of the Attorney-General that Congress has uncontrolled power to regulate or to prohibit — at least partially — interstate commerce, and that it may use this power to accomplish results which are wholly beyond its jurisdiction.

[2] Monongahela Navigation Co. *v.* U. S., 148 U. S. 312, 336.

[3] Lord *v.* Steamship Co., 102 U. S. 541.

state and federal governments the right to engage in commerce originate in the law of one jurisdiction or the other. In foreign relations the general government stands in the place of and represents every state. An embargo of foreign commerce by federal law may therefore be proper, for the federal government cannot be compelled to grant or to continue its authority and protection.

As to interstate commerce no such considerations arise. Here the question is presented solely as between the individual and state and federal governments. The subject is not affected by international considerations, nor does the United States in these relations take the place of, or represent a state or state laws. The question is therefore clearly presented whether as between these parties the right to engage in interstate commerce is derived from state or federal law.[1]

The essential element which for present purposes constitutes interstate commerce is found in the right of an individual to go, or to ship his goods, from one state to another. This, from the standpoint of the shipper, is interstate commerce, and the right of every person and corporation to engage in this commerce is secured by a correlative duty which the law imposes upon interstate carriers to receive goods for carriage and to transport them from one state to another. It is evident that the carrier's duty to transport goods to a specified place out of the state can exist only in favor of those entitled to send them to that place, and the source of the right and of the duty are therefore the same. The origin of the right to engage in interstate commerce may therefore conveniently be traced by an examination into the source of the obligations which are imposed by law upon an interstate carrier.

By English law a common carrier was under an imposed duty to receive, carry, and deliver, and while goods were in his possession to answer for them as insurer save as against two perils, — acts of God and of public enemies. The obligation which is thus stated in double form was in fact a single duty, — that to carry safely, — the power which imposed the duty measuring also the extent of the liability thus created.

As early as the reign of Charles II. it was held that the liability of an insurer rested upon a carrier engaged in foreign commerce,[2] and though in this case the loss occurred in England, nevertheless

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[1] Prentice & Egan, The Commerce Clause of the Federal Constitution, 37–42.

[2] Mors *v.* Slue, T. Raym. 220.

the liability was regarded as attaching to the carrier so long as he had charge of the goods; — the duty was not restricted to the territory of the sovereign which imposed it.[1] In this country many cases of the same character exist and the rule appears to be well settled.[2]

In most instances, however, the cases concern the carrier's liability after acceptance of the goods, and although the power of the sovereign which imposed this liability must have extended also to impose the duty of acceptance, nevertheless there was no express decision upon this point so far as concerned transportation beyond the realm of England until the case of Crouch *v.* London & N. W. R.[3] in 1854. This was an action to recover damages caused by defendant's refusal to accept goods as a common carrier, for transportation from London to Glasgow. On the part of the railway company, it was urged that the duty of carriage did not extend beyond the realm by whose law it was imposed. Upon this subject Jervis, C. J., said:

"It is not denied, — although the authorities on the subject are neither numerous or satisfactory, — that, if a man holds himself out as a common carrier between two places which are within the realm, he is bound to carry all goods (within reasonable limits) that may be tendered to him to be carried between those places. The only question that arises upon this part of the case, is, whether that rule applies where one of the termini is a place out of England. I am of opinion that it does. Where a party who holds himself out as a common carrier accepts goods, the common law, — that is the law founded upon the custom of the realm, — engrafts upon such acceptance a contract to carry safely and to insure, subject only to two exceptions, viz. the act of God and the Queen's enemies. It was admitted in the course of the argument, and indeed, it could not be denied, that, if the defendants had accepted the goods in London, the common law obligation to carry them to Glasgow would have attached. The case of Morse *v.* Slue, 1 Ventr. 190, T. Raym. 220, 1 Mod. 85, 2 Keble, 866, 3 Keble, 75, 112, 135, 2 Levinz, 69, is admitted to be an authority to that extent: and Molloy's commentary on that case[4] puts the matter beyond doubt. If, then, it is admitted, that, when once the defendants have held themselves out to be common carriers, there is engrafted upon their acceptance of the goods to be carried a common law liability to *carry* to all places to which they profess to carry, even if one of those places should be beyond the

[1] Nugent *v.* Smith, 1 Com. Pl. Div. 19, 23; Elliott *v.* Rossell, 10 Johns. 1.

[2] See review of early decisions by Chancellor Kent in case last cited.

[3] 14 C. B. 255.

[4] De Jure Maritimo, Book II. c. 2, sec. 2.

confines of the realm, it would seem that they must equally take upon themselves the other part of the common law liability of carriers, viz. an obligation to *accept* all goods which are offered to them for conveyance to and from the places to which they profess to carry, whether one of those places be without the realm or not."

In this opinion Cresswell, J., concurred, saying:

"It is said that they [the defendant company] cannot be *common* carriers from London to Glasgow, because a portion of the latter journey is beyond the confines of England. I apprehend, however, it is clear that the defendants may be common carriers out of the realm as well as within it. A common carrier is one who, in the language of Lord Holt, in Coggs *v.* Bernard, 2 Lord Raym. 909, exercises a public employment; and the law charges him 'to carry goods against all events, but acts of God and of the enemies of the King.' Morse *v.* Slue is a direct authority, that, though the contract be to carry to a place out of the kingdom, the liability of the common carrier attaches to them as to one incident, viz. the obligation safely to carry and deliver: and, if so, I cannot see why the other incident, viz. the obligation to accept goods for conveyance, where offered in a reasonable time, and under reasonable circumstances, should not also attach."

By common law, therefore, the carrier's duty to receive, carry, and deliver arose from the law of the state where the transportation originated and followed the carrier through other jurisdictions until performance was complete.

Foreign states might restrict this duty even to the point of forbidding entrance, but in the absence of such laws, and so far as concerned English law, the carrier remained subject to his initial duty until delivery of the goods. This rule prevailed here before the adoption of the Constitution. The conduct of commerce was however, under the conditions of that time, much embarrassed by conflicting and discriminating state legislation, and to avoid impediments, which concerned not the existence but the exercise of the right, Congress was empowered to regulate interstate commerce. Without such provision it was anticipated that,

"Each state or separate confederacy would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences and exclusions which would beget discontent. The habits of intercourse on the basis of equal privileges to which we have been accustomed since the earliest settlement of the country would give a keener edge to these causes of discontent than they would naturally have independent of that circumstance." [1]

[1] Federalist, No. VII.

All this it was intended by the Constitution to prevent,[1] and what the states are thus forbidden to do is equally forbidden to individuals.[2] It was not anticipated that Congress might or could itself restrict the free intercourse which had so long existed, for the purpose of the grant was to establish "an unrestricted intercourse between the states,"[3] and, as has well been said,

"The whole Constitution in all of its parts looks to the security and free trade in persons and goods between the states of the Union and by this clause prohibits either Congress or the states to interfere with this freedom of intercourse and trade."[4]

The intention of the makers of the Constitution then was to preserve existing rights, freeing their exercise from interference, and the history of commercial regulations by Congress and by the states shows that by this clause no change in origin of fundamental rights was intended.

The federal commercial power, Edmund Randolph said, in the opinion which as first Attorney-General under the Constitution he rendered to President Washington on February 12, 1791, extends to,

"little more than to establish the forms of commercial intercourse between the states and to keep the prohibitions which the Constitution imposed upon that intercourse undiminished in their operation; that is, to prevent taxes on imports or exports, preferences to one port over another by any regulation of commerce or revenue; and duties upon the entering or clearing of the vessels of one state in the ports of another."

Even Alexander Hamilton, in his opinion upon the same subject rendered to Washington eleven days later, while earnestly defending this provision of the Constitution as a substantial and wide grant of power, nevertheless makes no reference to any consequent limitations upon the authority of the states.

Under the Constitution therefore, as under the Confederation, the right to engage in commerce was derived from state law. This appears very clearly from early action of the states in which the power to give this right in one form or another was distinctly asserted.

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[1] Railroad Co. *v.* Richmond, 19 Wall. 584.

[2] *In re* Debs, 158 U. S. 564; Addyston Pipe & Steel Co. *v.* U. S., 175 U. S. 211.

[3] Federalist, No. XI.

[4] Tucker on Constitution, § 256.

In 1802 the Supreme Court of Connecticut sustained a suit brought against the owner of a stage coach engaged in transportation between Westfield in Massachusetts and Albany in New York, for carrying passengers within the State of Connecticut in violation of a law of that state which granted an exclusive right to the plaintiff to engage in such transportation.[1] In Maryland, Vermont, and Virginia the right to carry passengers had been granted as a monopoly, and it appears that these laws were construed as applying to travel between the states.[2] Furthermore, as showing the view of this matter taken by Congress, it is said that a motion was made in the second Congress to permit stage coaches carrying the mail from state to state to transport passengers also, but that the motion was lost as being in violation of the rights of the states.[3]

The decision of the Supreme Court in Gibbons *v.* Ogden[4] greatly extended the field of national control. From this time until the decision of Cooley *v.* Port Wardens,[5] in 1851, the history of the commerce clause is the history of the struggle between those who, on the one hand, insisted that all federal powers derived therefrom were in their nature exclusive of all state control, and those who, on the other hand, denied that state powers were limited by any implied prohibition contained in this clause.[6]

This discussion was thought to be definitely settled by the case of Cooley *v.* Port Wardens, in a decision which separates the great field over which Congress is given the power of regulation into two smaller fields, — one consisting of matters of a general nature in which federal jurisdiction, whether exercised or not, excludes all state action; the other field consisting of matters of a local nature in which the states may act until superseded by Congress. This rule the court has since said is perhaps the most satisfactory solution which has ever been given of this vexed question,[7] and "may be considered as expressing the final judgment of the court."[8]

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[1] Perrin *v.* Sikes, 1 Day (Conn.) 19.

[2] Maryland: Act of December 21, 1790, chap. 28; Laws of 1785, chap. 14; Act of December 22, 1788, chap. 18; Act of December 28, 1793, chap. 15. Vermont: Act of October 31, 1792. Virginia: Act of December 21, 1790, chap. 62; Act of October 31, 1792, chap. 98.

[3] McMaster's History of the American people, vol. 2, p. 60.

[4] 9 Wheat. 1.

[5] 12 How. 299.

[6] See Prentice & Egan, Commerce Clause of Federal Constitution, pp. 1–42.

[7] Crandall *v.* Nevada, 6 Wall. 35, 42.

[8] Mobile *v.* Kimball, 102 U. S. 691, 702.

The right to engage in interstate commerce and the duty of carriers to receive, carry, and deliver across state lines find, however, no place in this classification. These rights and duties are not merely of local law, for they do not terminate at state lines, but follow the carrier into other jurisdictions until performance is complete. They are therefore not within that class of powers which under the rule of Cooley *v.* Port Wardens the states may exercise by sufferance until their action is superseded by Congress.

On the other hand these rights and duties, although general in character, do not come from federal law, for before the Interstate Commerce Act in 1887 there was no general federal law upon the subject, and even now the federal statutes cover but part of the field and apply only to certain classes of interstate carriers. There is no federal common law.[1] The important facts are, then, that

1. Interstate carriers are now, as they have been, under a duty imposed by law to receive, carry, and deliver across state lines;

2. This law does not now and never did emanate from the federal government. It existed before the establishment of any federal law upon the subject, and is independent of such law, applying to carriers who are not within the operation of the federal statute;

3. The duty is therefore now, as it has been, imposed by state law.

Consideration of the nature of the carrier's duty leads to the same conclusion.

The obligation in question does not arise in different portions from the laws of the several states as the carrier passes through them, for the duty to transport over the route served by the carrier from point of origin in one state to destination in another is "entire and indivisible."[2]

"There is no ground on which to imply a different extent of undertaking in the same contract for the carriage which is beyond the realm from that which is within it . . . the promise or undertaking to be implied is, both on principle and authority, one and indivisible, and applies precisely to the

[1] Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92; Smith *v.* Alabama, 124 U. S. 465; Chicago, etc., Ry. Co. *v.* Solan, 169 U. S. 133; Swift *v.* Phila., etc., Ry. Co. 58 Fed. 858, 64 Fed. 59; Gatton *v.* Railway Co., 95 Ia. 112.

[2] Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397; McDaniel *v.* Railroad Co., 24 Ia. 412, 417; Dyke *v.* Erie Ry. Co., 45 N. Y. 113; Illinois Central R. Co. *v.* Beebe, 174 Ill. 13; Waldron *v.* Canadian Pac. Ry., 22 Wash. 253, 60 Pac. 653; Pittman *v.* Am. Exp. Co., 24 Tex. Civ. Ap. 595, 59 S. W. 949; Ohio & M. R. Co. *v.* Tabor, 98 Ky. 503, 36 S. W. 18.

same extent to a loss occurring in the part of the voyage beyond the realm as to one occurring in the part within the realm."[1]

The carrier and shipper may by contract so restrict the carrier's obligations that instead of one "through" carriage there shall in effect be several undertakings for smaller distances.[2] With these questions we are not now concerned, except to note their existence. Upon a through contract the carrier's obligation is single. This obligation arises when the goods are received or offered for transportation, and damages for failure to carry and deliver at destination may be recovered from the carrier, although the goods may never have left the state of origin.

It has been suggested that the obligation for breach whereof damages are recoverable arises not from state law but from contract; that the law of the state imposes a duty to accept for carriage to any point upon the carrier's line, whether within the state or beyond its boundary, and that when accepted the shipper's rights are dependent upon the contract. It was expressly so held in Nugent *v.* Smith.[3] This theory explains nothing. It needs no decision to establish that "persons may voluntarily contract to do what no legislature would have a right to compel them to do,"[4] but the present question concerns solely the state authority to compel. If the states are without jurisdiction to impose the obligation of carriage beyond their borders, the jurisdiction cannot be acquired by calling the obligation a contract rather than a duty.

Furthermore, as the theory is stated, the carrier is under no obligation to make any contract save that which is imposed by law, and the obligation thus arising exists without his assent. Clearly this is the statement, not of a contractual but of a legal duty, and so it is held.

"To impose upon the carrier the duty of receiving and carrying . . . requires no contract."[5]

A state statute requiring a carrier to furnish a shipper with cars for transportation on its line to other states creates a duty for breach whereof damages may be recovered.[6]

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[1] Nugent *v.* Smith, 1 Com. Pl. Div. 19, 24, 25.

[2] Hughes *v.* Pennsylvania R. Co., 202 Pa. St. 222, 51 Atl. 990; Heiserman *v.* Burlington C. R. & N. R. Co., 63 Ia. 732; Wells *v.* Thomas, 27 Mo. 17.

[3] 1 Com. Pl. Div. 19, 23.

[4] Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 697.

[5] Inman *v.* St. Louis S. W. Ry. Co., 14 Tex. Civ. Ap. 39, 37 S. W. Rep. 37, 41.

[6] Chicago, St. L. & P. Ry. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451.

The duty which rests upon interstate carriers is the same in character as that which rests upon all other carriers. It is "founded on the custom of the realm at common law, and is independent of contract, being imposed by law for the protection of the owner and founded upon public policy and commercial necessity."[1] This duty arises when goods are tendered for transportation and before any actual contract is made.[2] Furthermore the carrier's obligations cannot be referred to its corporate franchises, for the duty is the same although the carrier be not incorporated. Even in the case of corporations the charter does not measure the duty, for in some states a carrier is under greater obligations than those imposed by charter.[3] The result of these authorities appears to be that the duty of an interstate carrier to receive, carry, and deliver goods, and with it the correlative right of the shipper to send goods from one state to another, are both derived from the law of the state from which the goods are sent; that this duty and right are indivisible by state lines and follow the goods from origin to destination. So in the case of individuals the right to travel from one state to another is given by state laws. Under federal decisions these rights are also, to some extent, given by federal law, but they are not dependent upon that law, nor in their broadest extent do they originate there. The right to leave a state comes from its laws, and the commerce clause prevents a state from withdrawing that right.[4]

In the exercise of these rights the laws of other jurisdictions will attach for different purposes. Federal control attaches to secure freedom of interstate commerce, to regulate the amount of rates, to require humane treatment for animals and other purposes.

State laws attach as the goods or passengers cross state lines, to regulate the speed of trains and to make other police regulations, such, for example, as to designate the point at which live stock may be landed in a city,[5] and to define what shall constitute a legal delivery;[6] but in its general character, — that is, in those respects

[1] Chitty on Carriers, 34, 35; Packard *v.* Taylor, 35 Ark. 402; Clyde S. S. Co. *v.* Burrows, 36 Fla. 121, 132.

[2] Bluthenthal *v.* Southern Ry. Co., 84 Fed. 920.

[3] Pullman Co. *v.* Adams, 78 Miss. 814, 30 So. 757; Pullman Co. *v.* Adams, 189 U. S. 420; W. U. Tel. Co. *v.* Eubank, 100 Ky. 591, 38 S. W. 1068.

[4] Conway *v.* Taylor's Ex'or, 1 Black 603.

[5] State *v.* Fagan, 22 La. Ann. 545.

[6] Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 454, citing Pope *v.* Nickerson, 3 Story 465, 484-5; Robertson *v.* Jackson, 2 C. B. 412; Lloyd *v.* Guibert, L. R., 1 Q. B. 115, 126, 6 B. & S. 100, 137.

which are not of merely local importance, the duty to receive, carry, and deliver, the right to collect freight and the extent of liability for loss, — the right and duty of the carrier is founded upon the law of the state by which the duty of carriage was imposed.

In defining the limits of the different jurisdictions in these respects we shall often meet the fundamental difficulty mentioned at the commencement of this article, but the difficulty will be practical, — the principles which should control its determination being fairly well settled.

In the classes of cases to which reference has been made the right to engage in interstate commerce appears to be well recognized as originating in the law of the state in which transportation begins.

The practical application of this rule has most often been involved in cases concerning the carrier's right to restrict his common law liabilities. These cases present a conflict of decisions, arising sometimes from doubt as to the source of the carrier's duties, but more often from failure to identify his liability for loss or damage as part of his fundamental duty, classifying it instead among local matters subject to state control. Notwithstanding the confusion which has thus arisen, the great weight of authority holds that a carrier's liability is measured by the law of the state in which the transportation originated. Facts and necessities have compelled the courts as practical men to reach a conclusion which is in harmony with precedent and with English law. The decisions on this subject are therefore the more worthy of attention.

At common law a carrier's duty of safe carriage was absolute in one respect only, — the carrier could not be relieved of liability for loss caused by his negligence. In other respects he could purchase exemption by contract. In many states this rule has been changed by statute, so that the carrier's right to limit his liability varies in different jurisdictions, a contract which is valid in one state being forbidden in another.

By what law shall these stipulations occurring in bills of lading for interstate transportation be controlled?

It has been shown that historically the English decisions establishing the common law duty of a carrier to receive, carry, and deliver across national boundary lines have been reached by tracing the carrier's duty of insurance, — that is, the courts have held that the duty to carry is part of a larger obligation, of which the duty

of protection is another part, and that both are of the same origin. It has therefore been held in those courts that wherever the duty of insurance has been found the duty of carriage exists also.

It should therefore be easy, having traced the duty of an interstate carrier to receive, carry, and deliver across state lines, to reverse the line of investigation pursued by the English courts and to show that the duty of safe keeping in the extent to which it was imposed when the goods were received accompanies the duty of carriage, and is part of the broad obligation of the carrier.

A carrier comes into a state lawfully charged in another jurisdiction with performance of certain duties. Under the Constitution the state into which he comes cannot withdraw from the carrier the right of free entry in performance of that duty, nor can it discharge the carrier from its primary and essential obligations.[1] It may, as has been said, control all local matters, but the fundamental duty which follows the carrier may not be altered, taxed, burdened, or conditioned.

The state cannot regulate the carrier's charge for interstate transportation, nor can the charge be divided so as to apportion any part to a particular state.[2] How then can the state regulate the fundamental character or amount of the carrier's service, or impose as a result of entering the state, duties of insurance which were not imposed with the duty of carriage? To say that the state may not regulate rates but may determine the service which shall be rendered for a rate fixed by the carrier or regulated by the Interstate Commerce Commission would in effect permit the states to regulate interstate rates, for the amount of the carrier's liability is "indissolubly bound up" with the amount of his charge.[3]

"The presumption is conclusive that if the liability had been assumed on a valuation as great as that now alleged a higher rate of freight would have been charged."[4]

"The carrier's contract does not vary with each jurisdiction in which it may be partly performed, for the service rendered is single, the transportation performed and the liability assumed being the measure on the one side by which the compensation to be paid on the other side is determined."[5]

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[1] Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465.

[2] Wabash R. Co. *v.* Illinois, 118 U. S. 557.

[3] Hart *v.* Pa. R. Co., 112 U. S. 331.

[4] *Ibid.*, 331, 339.

[5] Prentice & Egan, Commerce Clause, p. 167 and cases cited. See Pittman *v.* Express Co., 24 Tex. Civ. Ap. 595, 59 S. W. Rep. 949, where the text and authorities of this book are approved and copied.

In many states this national character of the question has been recognized. In others the carrier's liability has been considered a subject of local regulation, and so seven different answers have been given to the question as to the law which shall control the carrier's liability upon his contract of carriage. It is said,

1. That the carrier's liability, being a matter which concerns more states than one, is subject to federal control alone, and that all state laws on the subject as applied to interstate commerce are void.

2. That the contract is governed by the law of the state from which the carrier derives its corporate franchise.

3. By the law of the state in which the contract was made, whether partly performed there or not.

4. By the law of the state where breach occurs.

5. By the law of the state in which suit is brought.

6. By the law of any state in which it is to be partly performed with reference to which the parties intended to contract.

7. By the law of the state which imposed the duty to receive, carry, and deliver.

1. The rule that a state may not by statute regulate the extent of a carrier's liability upon contracts for interstate transportation was announced in Western Union Tel. Co. *v.* Burgess:

"One great object of delegating to the federal government the exclusive power over the subject, was that the rules and regulations established by law for the government and control of those engaged in commerce between the states should be uniform. This object would be defeated if each state were permitted by legislation to prescribe what stipulations may or what may not be entered into for their protection against litigation, by those employed in carrying passengers or freight between the states, and those engaged in transmitting messages by telegraph from one state to another. Such legislation, in the opinion of this court, imposes restrictions and burdens upon interstate commerce in conflict with the federal constitution and must therefore be held to be void so far as it applies to messages sent into and received from another state."[1]

Such considerations greatly influenced the court in Missouri Pacific Ry. Co. *v.* Sherwood,[2] Texas & Pac. Railway Co. *v.* Richmond,[3] Otis Co. *v.* Mo. Pac. Co.,[4] and other cases.

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[1] W. U. Tel. Co. *v.* Burgess, 43 S. W. 1033.

[2] 84 Tex. 125.

[3] 61 S. W. 410, reversed in 94 Tex. 571; 63 S. W. 619.

[4] 112 Mo. 622.

This view, which is correct in considering the carrier's liability an essential part of his single and indivisible service, nevertheless overlooks the fact that the carrier's liability, whatever it is, results from the law of some state. These cases are inconsistent with all other decisions on the subject, which, however discordant, agree in holding that the subject is not beyond state jurisdiction. For all these reasons this rule is now abandoned by the courts which first announced it.[1]

2. In some cases it has been argued that when by the law of the state of incorporation carriers are forbidden to contract for limitation of their common law liability, this statutory provision should be read into the charter of the company so that it would be without power to limit its liability by such contract in any jurisdiction. This question was stated but not decided by the Federal Court of Appeals in Thomas *v.* Lancaster Mills,[2] the decision resting on other grounds. The trial court had held that the carrier's liability was not thus measured.[3] To the same effect is Tecumseh Mills *v.* Louisville & N. R. Co.[4] In Brown *v.* Camden & A. R. Company,[5] a contrary conclusion was reached, and it was held that a carrier's liability resulting from neglect in the exercise of its franchise was to be determined according to the law of the state by which the franchise was granted. Another doctrine is now established in Pennsylvania,[6] and the Brown case may be considered as overruled.

The theory has little merit, and the case announcing it has been mentioned by the Supreme Court of the United States without approval.[7] No reason appears why this particular provision of statutory law should be read into the charter rather than many others. Nor if such a carrier should be engaged in domestic commerce within a state other than that of its incorporation, and where contract limitation was not forbidden, does it appear that any good purpose would be served by compelling it to assume liabilities not imposed upon its competitors. At best the rule would have but partial operation and would offer no solution for those cases where

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[1] Pittman *v.* Am. Ex. Co., 24 Tex. Civ. Ap. 595, 59 S. W. 949.
[2] 71 Fed. 481.
[3] S. C. *sub nom.* Thomas *v.* Wabash R. Co., 63 Fed. 200.
[4] 108 Ky. 572; 57 S. W. 9.
[5] 83 Pa. 316.
[6] Hughes *v.* Pa. R. Co., 202 Pa. St. 222, 51 Atl. 990.
[7] 129 U. S. 457, 458.

a carrier organized in a state where limitation of liability was permitted, engaged in commerce in other states.

3. In a number of cases the suggestion is made that a contract void where made is void everywhere, and that this rule would apply to contracts limiting a carrier's liability, although the shipment was to be made wholly outside the state of contract. It may be inferred that the court held this view in McDaniel *v.* Railway Co.,[1] but the case did not so decide, and no reason appears for so great a departure from the ordinary principles of law. Contracts which are good by the law of the place of performance are not rendered illegal because signed in a jurisdiction where they could not be performed.[2]

4. Some cases have held that the validity and effect of such contracts are to be determined by the law of the state where the loss or injury occurs:

"Where a contract containing a stipulation limiting liability for negligence, is made in one state, but with a view to its performance by transportation through or into one or more other states, we see no reason why it should not be construed in accordance with the law of the state, where its negligent breach causing injury occurs. If such a contract comes under construction, in a state like Pennsylvania whose policy prohibits such exemption, and the injury has occurred in a state where the contract is valid, the stipulation will be enforced as in Forepaugh *v.* Railroad Co., 128 Pa. 217, and in Fairchild *v.* Railroad Co., 148 Pa. 527. But if the injury has taken place within its limits, it will declare the contract null and void, as in Burnett *v.* Railroad Co., 176 Pa. 45." [3]

It is not to be denied that there are phrases in opinions of the Supreme Court of the United States which taken alone seem to support this view. Thus in Smith *v.* Alabama,[4] it is said:

"A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the laws of the state for acts of non-feasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the state in its courts." [5]

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[1] 24 Ia. 412.

[2] Forepaugh *v.* Delaware, etc., Ry. Co., 128 Pa. St. 217; Atchison, T. & S. F. Ry. *v.* Grant, 6 Tex. Civ. Ap. 674, 28 S. W. 98.

[3] Hughes *v.* Pa. R. Co., 202 Pa. St. 222, 51 Atl 990, citing Barter *v.* Wheeler, 49 N. H. 9; Railroad Co. *v.* Sheppard, 56 Ohio St. 69, and Story, Cont. § 655.

[4] 124 U. S. 476.

[5] See Chicago, M. & St. P. Ry. *v.* Solan, 169 U. S. 133, 137.

The law of the state of destination does not impose the duty of delivery, but it can, as has been said, define what shall constitute a legal delivery. The statement that if a carrier fail to deliver "at the right time or place he is liable in an action for damages under the laws of the state in its courts" is therefore strictly in accordance with principle. This power to regulate delivery, broadly as it is sometimes announced, is in fact much restricted, for, as the court said in Wabash R. R. *v.* Illinois,[1]

"If each one of the states through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation as an element of interstate commerce might be too oppressive to be submitted to."

Many other phrases like that quoted from Smith *v.* Alabama might be found, but notwithstanding these general expressions, the rule of the federal Supreme Court is well settled that the contract of carriage in its fundamental character is a unit — "a single fare for a single service" — and that the carrier's liability does not vary in different jurisdictions. It is also the English rule that the carrier's liability "applies precisely to the same extent to a loss occurring in the part of the voyage beyond the realm as to one occurring in the part within the realm."[2] The case of Barter *v.* Wheeler,[3] which the Supreme Court of Pennsylvania cites to support its decision, is of doubtful authority in the state where rendered,[4] and was disapproved by the Supreme Court of the United States in Liverpool Steam Co. *v.* Phenix Ins. Co.[5] On the other hand, cases which establish a different rule, inconsistent with the doctrine which judges the carrier's liability according to the law of the place of breach, have, as will be seen, had the steady support of the federal Supreme Court.

"It would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states, which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or

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[1] 118 U. S. 557, 572.
[2] Nugent *v.* Smith, 1 Com. Pl. Div. 19, 23.
[3] 49 N. H. 9, 29.
[4] Gray *v.* Jackson, 51 N. H. 9, 39.
[5] 129 U. S. 397, 458.

taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."[1]

5. The theory that the validity of the stipulations limiting a carrier's liability are to be determined by the law of the forum prevails only in Nebraska, and is supported, as the Supreme Court of that state admits, "by the use of adjudicated cases not treating of or involving the liability of common carriers." The case in which the doctrine was announced is that of Chicago B. & Q. R. Co. *v.* Gardiner,[2] an action brought to recover for damage to property shipped from Illinois into Nebraska and injured somewhere on the road. In the bill of lading the property was valued at $100 and liability limited to that sum. The court, assuming this limitation to be valid in Illinois, refused nevertheless to support it in Nebraska, saying:

"As a general rule the proposition may be accepted as correct that where parties, in good faith, have entered into a contract valid and binding in the state where made, it will be enforced in another state. This enforcement is a matter of comity, however, and not of absolute right. As was said by Chief Justice Taney in Bank *v.* Earle, 13 Pet. 519, 'the comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and it is inadmissible when contrary to its policy, or prejudicial to its interests.'"

The limitation in question was considered contrary to the policy of Nebraska, and the court refused therefore to support it.

The argument is defective, for no question of international comity is involved. "In the matter of interstate commerce," as Mr. Justice Bradley said, "the United States are but one country."[3]

6. In many instances language has been used which seems to indicate that in determining the law by which contracts for interstate shipment should be judged, reference will be had to the intention of the parties. Thus in the leading case, Liverpool Steam Co. *v.* Phenix Ins. Co.,[4] a case involving foreign commerce, the court said:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence of authority, the general rule, that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties

[1] Wabash R. Co. *v.* Illinois, 118 U. S. 557, 573.
[2] 51 Neb. 70; 70 N. W. 508.
[3] Robbins *v.* Taxing District, 120 U. S. 489, 494.
[4] 129 U. S. 397, 458.

at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the law of some other country."

This rule, whose broad language has been often quoted, does not mean that under any circumstances the parties to a contract of affreightment may at will select the law of any state or country as the law which shall control the contract, but that they are limited to the law of some state in which the contract is to be partly performed. Even when thus limited the rule cannot be generally applied, for if a contract is an American contract a stipulation in the bill of lading that it shall be governed by foreign law is one which the courts refuse to enforce.[1]

The rule does not offer a satisfactory guide in cases of interstate commerce, for

(*a*) If a contract be in fact a contract of one state, the parties cannot by stipulation make it subject to any other law. In matters where they are free to contract they may arrange as they please, but this liberty cannot be so used as to enable them in a contract which is actually subject to the law of a particular state to escape the positive duties or obligations lawfully imposed by that state.

(*b*) A rule of construction by which, in seeking judicially to determine the intent of the parties, one construction would be given to a contract of shipment from a particular place when made by a citizen of one state, and another construction when made from the same place by a citizen of another state, would result in confusion, and the same would be true if other indicia of intention were placed above that of residence of the parties.

(*c*) Lastly, the search for intent is unsatisfactory, for, as the court said in Grand *v.* Livingston,[2] the question

"can hardly be said to involve the actual mental operations of the parties, for, as a matter of fact, they probably did not stop to consider what was the

[1] Knott *v.* Botany Mills, 179 U. S. 69; Botany Mills *v.* Knott, 82 Fed. 471; The Glenmavis, 69 Fed. 472; The Iowa, 50 Fed. 561; The Trinacria, 42 Fed. 863; Lewisohn *v.* Nat. S. S. Co., 56 Fed. 602; The Hugo, 57 Fed. 403. See also Campania La Flecha *v.* Brauer, 168 U. S. 104, 118, where the subject was mentioned but no decisive opinion expressed.

[2] 4 App. Div. 589, 595, affirmed 158 N. Y. 688.

legal effect of their agreement, or whether there was any diversity in the law of the two states, and therefore, when we speak of the 'question of intent' we are making use of what may perhaps be termed a 'legal fiction.'"

7. The rule which appears to have the support of the Supreme Court of the United States and which is favored also by the weight of authority in state and lower federal courts, is that stipulations limiting a carrier's liability in contracts for interstate transportation are governed by the law of the state imposing the duty of carriage and care.

The question whether or not a duty may be waived depends upon the nature of the duty itself, and this in turn depends solely upon the law which established the duty.

This, it is believed, will appear from the decisions upon the subject. In Dyke *v.* Erie Railway,[1] the liability of a railway company to a passenger travelling from place to place in New York, but injured in Pennsylvania, was considered. Under the Pennsylvania law damages were limited. By the New York law no such statutory limit was imposed. It was held that the New York law controlled the case. This judgment was cited with approval by the Supreme Court of the United States in Liverpool S. Co. *v.* Phenix Ins. Co.[2] Suits to recover damages for personal injury are controlled by considerations which do not apply to carriers of goods. Notwithstanding this there appears to be a tendency to establish the same rule in both classes of cases.

Pennsylvania Co. *v.* Fairchild [3] was an action to recover damages for loss of goods which were shipped from Indiana under a bill of lading which exempted the carrier from liability for loss by fire, and were burned in Illinois. This stipulation was valid in the former state, but forbidden in the latter. The law of Indiana was applied and the contract upheld. This case also was approved by the Supreme Court of the United States,[4] and has been followed in Illinois by the recent decision of Illinois Central R. Co. *v.* Beebe.[5]

Thomas *v.* Railway Co.[6] was a similar case brought to recover for the loss of goods consigned from Memphis to a point in Massachusetts and burned in Illinois. Under the law of Tennessee the stipulation limiting the liability of the carrier was valid, and this stipulation was upheld. The judgment was reversed by the Cir-

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[1] 45 N. Y. 113.
[2] 129 U. S. 397, 456.
[3] 69 Ill. 260.
[4] 129 U. S. 458.
[5] 174 Ill. 13, affirming 69 Ill. App. 363.
[6] 63 Fed. 200.

cuit Court of Appeals, but on grounds which do not affect the present question.[1]

In Grand *v.* Livingston,[2] a New York court held that stipulations limiting the carrier's liability for a shipment from Boston to Buffalo are to be judged by Massachusetts law, and in Brockway *v.* American Express Co.[3] the Supreme Court of Massachusetts held that a contract for shipment from Chicago to Boston was governed by the law of Illinois. In many other cases there have been similar judgments.[4]

In the recent case of Richmond, etc., R. Co. *v.* Patterson Tobacco Co.[5] it appeared that the Tobacco Company had shipped goods from Virginia to Louisiana by the Richmond & Alleghany Railroad under a through bill of lading which limited the carrier's liability to his own line. The goods were lost after leaving the possession of the Richmond Railroad. A statute of Virginia provides that such limitations upon a carrier's liability are ineffectual unless made by contract signed by the owner of the goods, which was not done in this case. It was held by the Supreme Court of Virginia that the statute referred to was valid as applied to interstate shipments, for " it declares what shall be the implied liability upon the carrier who receives goods for shipment in the absence of a special contract." This judgment was affirmed by the Supreme Court of the United States.

From this review of authorities it appears that although there is a conflict in the decisions which relate to the liability of a common carrier in interstate commerce, nevertheless the weight of authority indicates that his fundamental duties, together with the right to engage in commerce, arise from and are to be judged by the law of the state in which the transportation originates.

Every case involving the right of an interstate carrier to restrict

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[1] Thomas *v.* Lancaster Mills, 71 Fed. 481.

[2] 4 App. Div. 589, affirmed 158 N. Y. 688.

[3] 171 Mass. 158, 50 N. E. 626.

[4] Central Ry. *v.* Kavanaugh, 92 Fed. 56; Meuer *v.* Chicago, etc., Railway Co., 11 S. D. 94, 75 N. W. 823; Meuer *v.* Chicago, etc., Railway Co., 5 S. D. 568, 59 N. W. 945; Hazel *v.* Chicago & St. P. Ry. Co., 82 Ia. 477; Reed *v.* Western Union Tel. Co., 135 Mo. 661; Palmer *v.* Atchison, etc., Ry. Co., 101 Cal. 187, 35 Pac. 630; St. Joseph, etc., Ry. *v.* Palmer, 38 Neb. 463, 56 N. W. 957; Western, etc., Ry. *v.* Exposition Mills, 81 Ga. 522; Talbott *v.* Merchants Des. Trans. Co., 41 Ia. 247; Cantu *v.* Bennett, 39 Tex. 303; Ryan *v.* Missouri K. & T. Ry., 65 Tex. 13; Mexican Nat. Ry. *v.* Ware, 60 S. W. 343; Pittman *v.* Am. Ex. Co., 24 Tex. Civ. Ap. 595, 59 S. W. 949; Southern Pac. Co. *v.* Anderson, 26 Tex. Civ. Ap. 518, 63 S. W. 1023.

[5] 169 U. S. 311, 92 Va. 670.

its liability under the law of the state from which it operates, appears to involve a federal question, and therefore, if the view here advanced be correct, it is greatly to be desired that this question be presented to the Supreme Court for final determination. As that court has twice remarked of another phase of this question,

"It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country." [1]

From another aspect the importance of a judicial determination of these questions is still more apparent.

The claim that Congress may so regulate interstate commerce as in effect to control domestic commerce, — may even exclude from interstate commerce persons or property save such as conform to tests which the federal government may at will impose, invites examination into the source of the federal powers.

The regulation of domestic commerce, of

"all of these delicate, multiform, and vital interests — interests which in their nature are and must be, local in all the details of their successful management,"

is beyond federal power,[2] and it is to be hoped that no extension of this power may be authorized which will by indirection place domestic commerce within national control.

"In proportion as the General Government encroaches upon the rights of the states, in the same proportion does it impair its own power and detract from its ability to fulfil the purposes of its creation." [3]

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[1] Railroad Co. *v.* Mfg. Co., 16 Wall. 318, 324; Myrick *v.* Railroad Co., 107 U. S. 102, 106.

[2] Kidd *v.* Pearson, 128 U. S. 1, 21.

[3] Jackson, Second Inaugural Address.